IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 2170 of 2005

For Approval and Signature:

HON'BLE MR.JUSTICE A.M.KAPADIA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SUNRIZE POLYMERS & INDUSTRIES (INDIA) LTD. & 2 - Petitioner(s)

Versus

AMIN ENTERPRISE - Respondent(s)

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Appearance :

MR BP MUNSHI for Petitioner No(s).: 1,2,3.
MR SUBRAMANIAM IYER for Respondent No(s).: 1.

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CORAM : HON'BLE MR.JUSTICE A.M.KAPADIA

Date : 03/08/2005

ORAL JUDGMENT

1. By instant petition under Articles 226 and 227 of the Constitution, the petitioners seek to challenge the order dated 5.1.2005 rendered below application Ex.12, i.e., summons for judgment, in Summary Suit No.257 of

2004 by the learned 2nd Additional Judge, Small Causes Court, Vadodara by which the petitioners/original defendants are granted conditional leave to defend the suit on depositing Rs.50,000/- within one month from the date of passing of the order.

2. According to the petitioners, the respondent/original plaintiff is doing business of civil construction work. The petitioners are constructing factory building and, therefore, the petitioners have placed the order to respondent company for labour contract for civil work of factory building at village Garadhiya, Taluka Savli, District Vadodara. As per the order, the respondent has started labour work of the petitioners' factory building for civil work and the petitioners have supplied the material like cement, sand, grit, etc., for the said work.

3. The respondent has issued two invoices to the petitioners, one dated 28.5.2004 for Rs.70,623/- for the work done by it against that the petitioners have paid Rs.29,385/- and Rs.615/- TDS deducted. So, Rs.40,623/- remain outstanding from that bill. Another bill dated 3.6.2004 for Rs.32,755.57 paise issued by the respondent to the petitioners. So, in all the respondent has to

receive Rs.73,018.57 paise from the petitioners which is still outstanding.

4. Due to non-cooperation and adamant behaviour of the petitioner company and its staff, the respondent has to pay the following amount to other agency which has hired to do the petitioners' job for completing the job as the respondent had to complete the work due to petitioners' fault. According to the respondent, the following is the amount recoverable from the petitioners over and above the bill amount:

(i)	JCB Machine Hiring Charges	Rs. 5,000/-
(ii)	Roller Machine Hiring Charges	Rs. 6,000/-
(iii)	Mixer Machine Hiring Charges	Rs. 7,000/-
(iv)	Vibrator Machine Hiring Charges	Rs. 4,500/-
(v)	Tractor Hiring Charges	Rs. 6,600/-
(vi)	Teka for shed Hiring Charges	Rs.12,000/-
(vii)	Diesel for the machines & tractors	Rs. 2,000/-
(viii)	Labour (Idle) paid	Rs.22,400/-
(ix)	Petrol Expenses	Rs. 5,000/-
(x)	Supervision Charges (Hired on behalf of their defendants)	Rs. 5,000/-

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Rs.75,500/-

5. The respondent has filed the suit to recover the amount in following break-up:

a) A decree for Rs.73,018.57 paise (Rupees seventy three thousand eighteen and paise fifty seven only) being the outstanding amount of the work done by the respondent of the petitioners company;

b) Plus Rs.4457.34 paise (Rupees four thousand four hundred fifty seven and paise thirty four only) being interest at the rate of 12% p.a. From the due date of the outstanding amount as stated above.

Thus the total claim of the plaintiff is Rs.1,52,975.91 paise.

6. The respondent has, therefore, instituted summary suit against the petitioners under Order 37 of the Code of Civil Procedure ('the Code' for short) to recover an amount of Rs.1,52,975.91 ps. together with interest and cost.

7. In the said suit, the respondent company has also taken out summons for judgment by filing application

Ex.12 wherein inter alia it was prayed to direct the petitioner company to deposit the amount.

8. The said application is contested by the petitioners by filing written objections wherein inter alia it is pleaded that there are triable issues and the respondent has not produced the document as required under Order 37 of the Code. Therefore, the defendants have raised defence as the amount claimed is not liquidated damage and therefore it was prayed to dismiss the application filed by the respondent for summons for judgment and to grant unconditional leave to defend the suit filed by the respondent.

9. The learned trial Judge after considering the averments made in the application, written objection and the submissions advanced at the bar, allowed the application and thereby granted conditional leave to the petitioners on condition of depositing Rs.50,000/- within one month from the date of passing of the order which has given rise to the present petition.

10. Mr. B.P. Munshi, learned advocate of the petitioners/original defendants, has contended that the petitioners have raised triable issues. The suit filed by

the respondent is not covered by Order 37 of the Code as the respondent has not claimed the liquidated damages.

In support of the aforesaid contention, he has relied upon the following decisions:

(a) M/s. Mechalec Engineers & Manufacturers v. M/s. Basic Equipment Corporation, AIR 1977 SC 577.

(b) Raj Duggal v. Ramesh Kumar Bansal, 1991 Supp. (1) SCC 191.

(c) State Bank of Saurashtra v. Ashit Shipping Services (P) Ltd., and another, 2002 (3) GLR 2401.

(d) Bharat Oil Depot v. Pari Prafulchandra Kantilal and others, 1983 GLH 222.

11. According to him, the learned trial Judge has committed illegality and infirmity and also jurisdictional error in passing the impugned order and therefore the said order deserves to be quashed and set aside by allowing this petition. He therefore urged to allow this petition.

12. Per contra, Mr. Subramaniam Iyer, learned advocate of the respondent/original plaintiff has contended that the petition itself is misconceived. In the memo of the petition no where the petitioners have challenged the

granting of conditional leave and in the prayer clause also a writ of mandamus is claimed quashing and setting aside the order below Ex.12. Therefore, according to him, no jurisdictional error is committed by the learned trial Judge in passing the impugned order. He therefore urged to dismiss the petition.

13. This Court has considered the submissions advanced by the learned advocates for the parties, perused the impugned order, the averments made in the petition and the judgments cited at the bar.

14. In the case of M/s. Mechalec Engineers (supra) relied upon by Mr. B.P. Munshi, learned advocate of the petitioners, the Supreme Court has laid down the following principles while considering question of granting leave to defend:

(a) If the defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.

(b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendant is

entitled to unconditional leave to defend.

(c)If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he has a defence, yet, shews such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.

(d) If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the Court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy

to the defendant by enabling him to try to prove a defence.

15. In light of the aforesaid principles enunciated by the Supreme Court for granting of unconditional leave, this Court has examined whether the the petitioners have raised triable issues. According to the petitioners, the respondent has not claimed liquidated sum and the respondent has not produced documents as required under Order 37 of the Code.

16. On going through the order passed by the learned trial Judge which is impugned in this petition, it is true that the learned trial Judge has not exhaustively dealt with the statutory provisions contained under Order 37 of the Code. However, on perusal of the averments made in the application as well as the defence raised by the petitioners, according to this Court, there is a privity of contract between both the parties in connection with the construction of the factory premises of the petitioners by the respondent which is not denied by the petitioners. The respondent in para 7 of the plaint has mentioned ten items which are the payment made by the respondent company to 3rd party agency for completing the work of the defendants factory. In all, according to the

respondent, Rs.75,500/- has been paid by it to third party agency on behalf of the petitioners and the learned trial Judge has imposed condition of depositing Rs.50,000/- as against the claim of Rs.1,52,975.91 paise. While considering the said aspect, the learned trial Judge has not considered the unliquidated damages and interest claimed by the respondent. According to this court, the defence raised by the petitioners is illusory, sham and practically moonshine and therefore according to this court, the petitioners have not raised triable issues. Therefore, the learned trial Judge has rightly imposed the condition of depositing Rs.50,000/- on the defendant which according to this court cannot be called arbitrary, capricious or perverse requiring interference of this court in the impugned order.

17. It may be noted that the petitioners have filed this petition labelling it as a petition under Articles 226 and 227 of the Constitution but this Court considers it as a petition filed under Article 227 of the Constitution of India as it is filed against an interlocutory order.

18. In the case of Sadhna Lodh v. National Insurance Company Limited, (2003) 3 SCC 524, a Three Judge Bench of the Supreme Court has held that petition would not lie

under Article 226 of the Constitution but petition would lie under Article 227 of the Constitution against an interlocutory order.

19. It is settled principle of law that the powers vested in the Court under 227 of the Constitution is a supervisory jurisdiction. The High Court must confine itself to the correcting of error of jurisdiction committed by the courts below and it cannot assume suo motu jurisdiction of appellate court and correct every mistake assumed to have been committed by the Courts below. It is a review of the decision making process and not the decision itself. The High Court cannot reappreciate preliminary or perceptive facts found by the fact finding authority under the statute. The aforesaid proposition of law is laid down by the Supreme Court in the case of (i) **Mohd. Yunus v. Mohd. Mustaqim and others**, AIR 1984 SC 38, (ii) **Khanna Improvement Trust v. Land Acquisition Tribunal and others** (1995) 2 SCC 557, (iii) **H.B. Gandhi v. M/s. Gopinath** (1992) Supp. 2 SCC 312 and (iv) **State of Maharashtra v. Milind and others** (2000) 1 SCC 4.

20. In view of the above, according to this court, no illegality or infirmity much less jurisdictional error

has been committed by the learned trial judge in passing the impugned order requiring interference of this Court in exercise of powers under Article 227 of the Constitution.

21. Seen in the above context, the petition lacks merit and deserves to be rejected.

22. For the foregoing reasons, the petition fails and accordingly it is rejected with no order as to costs. Rule is discharged. Interim relief granted at the time of issuance of rule shall stand vacated.

23. In the facts and circumstances of the case, the learned trial judge is directed to expedite hearing of the summary suit and shall try to dispose it of as early as possible and in doing so regard shall be had to the exigencies of the files pending on his board.

24. At the request of Mr. B.P. Munshi, learned advocate of the petitioners, time to deposit the amount of Rs.50,000/- is extended for a further period of four weeks hereof.

(A.M. Kapadia, J.)

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